

O'MELVENY & MYERS LLP

RANDALL W. EDWARDS (S.B. #179053)

redwards@omm.com

MATTHEW D. POWERS (S.B. # 212682)

mpowers@omm.com

Two Embarcadero Center, 28th Floor

San Francisco, California 94111

Telephone: (415) 984-8700

Facsimile: (415) 984-8701

REBECCA A. GIROLAMO (S.B. #293422)

rgirolamo@omm.com

400 South Hope Street

Suite 1900

Los Angeles, California 90071

Telephone: +1 213 430 6000

Facsimile: +1 213 430 6407

Attorneys for Defendant

YETI Coolers, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TAYLOR SMITH, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

YETI COOLERS, LLC,

Defendant.

Case No. 3:24-cv-01703-RFL

**YETI COOLERS, LLC'S REPLY BRIEF
IN SUPPORT OF REQUEST FOR
JUDICIAL NOTICE**

Date: September 3, 2024

Time: 10:00 AM

Courtroom: 15, 18th Floor

Judge: Hon. Rita F. Lin

*[Filed concurrently with YETI Coolers, LLC's
Reply in Support of Motion to Dismiss]*

1 **I. INTRODUCTION**

2 YETI Privacy Policy, cookie banner, and Terms and Conditions of Use all are properly
3 subject to judicial notice and incorporated by reference. As explained in detail in YETI's Request
4 for Judicial Notice ("RJN"), these documents—Exs. A-C to the Declaration of Hannah Tucker
5 (ECF No. 23-4)—are not subject to reasonable dispute *and* lie at the heart of Plaintiff's statutory
6 and constitutional privacy claims.

7 Plaintiff's RJN Opposition fails on its face to present any argument that would warrant
8 denial of YETI's RJN under governing law. Plaintiff does not dispute the authenticity of any of
9 these documents. Nor does she argue that privacy policies, terms, and a cookie banner are
10 somehow not proper subjects for judicial notice or that they have not been incorporated by
11 reference into her allegations. Instead, Plaintiff argues that the Court should not consider these
12 documents because "they are not relevant to Plaintiff's claims." Opp. at 3. But that contention is
13 belied by the numerous allegations in the First Amended Complaint that put these very
14 documents at issue. All her privacy claims are based on a supposed lack of consent, which in turn
15 depends on her express assertion that YETI had *no* privacy policy disclosing YETI would share
16 with its payment processor her limited personal and payment information when she voluntarily
17 entered that information when making her online purchase. See FAC ¶¶ 2, 6-10, 33-37, 43, 45,
18 47, 64.

19 Because Plaintiff does not dispute the authenticity of Exhibits A-C and because both her
20 factual allegations (and even her inconsistent arguments in her Opposition) show that these
21 documents are core to her claims, the Court should take judicial notice of these documents and
22 find them to have been incorporated by reference into her pleading.

23 **II. ARGUMENT**

24 Plaintiff does not dispute that Federal Rule of Evidence 201 permits courts to consider in
25 ruling on a Rule 12(b)(6) motion those "documents whose contents are alleged in a complaint and
26 whose authenticity no party questions, but which are not physically attached to the pleading....").
27 RJN at 2 (also citing cases). As detailed in YETI's RJN, Exhibits A-C are proper subjects of
28 judicial notice and incorporated by reference into the FAC because their authenticity is

undisputed, they bear directly on the disclosure and consent issues that form the basis of Plaintiff's statutory and constitutional privacy claims, she quotes or references them throughout the FAC, and Exhibits A and C are publicly available.

Rule 201's authenticity requirement is met: Exhibits A-C are not subject to reasonable dispute. Their authenticity is established by the declaration of Ms. Tucker. Plaintiff does nothing in the RJN Opposition to dispute their authenticity. By "fail[ing] to respond to the arguments raised in [YETI's RJN]," Plaintiff has "effectively abandoned" any contrary position. *Montgomery v. Specialized Loan Servicing, LLC*, 772 F. App'x 476, 477 (9th Cir. 2019).

YETI's Motion also establishes Rule 201's requirement that the document's content be alleged in the complaint. RJN at 2-4. Courts apply the incorporation by reference doctrine "to situations in which the plaintiff's claim depends on the contents of a document." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). In the Opposition, Plaintiff argues that Exhibits A-C are "irrelevant," Opp. at 3, even though they constitute key pages of the website at issue and are the very disclosures Plaintiff directly alleges do not exist. The contents of Exhibits A-C are core to Plaintiff's claims, and the issue of disclosures is repeatedly referenced throughout the FAC. Specifically, Plaintiff's claims are predicated on allegations in the FAC about what is, and allegedly is not, disclosed by YETI on its website. See FAC ¶¶ 2, 6-10, 33-37, 43, 45, 47, 64. Plaintiff further alleges that "there is **no** privacy policy that alerts consumers that their sensitive information is being shared and indefinitely stored by a third party." RJN at 3; FAC ¶ 37. The policy and related terms are thus part of Plaintiff's allegations, and the incorporation by reference doctrine permits the Court to consider the existence of such policies on the website on the key element of her consent.

Likewise, Plaintiff does not deny that numerous courts find terms of service and privacy policies to be proper subjects of the doctrine of incorporation by reference. *E.g.*, Mot. at 2-4 (citing cases); See *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 813-14 (N.D. Cal. 2020) (incorporating by reference Google's Terms of Service and Privacy policy because these documents "form[ed] the basis" for Plaintiffs claims); *Hoey v. Sony Elecs., Inc.*, 515 F. Supp. 2d 1099, 1103 (N.D. Cal. 2007) (court may take judicial notice of document if complaint refers

1 extensively to it or if it forms basis of plaintiffs’ claims). As discussed above, Plaintiff discusses
 2 what those documents say (or, allegedly, do not say). And Plaintiff herself references certain
 3 cherry-picked pages on the website that purportedly support her claims. Opp. at 3 (“Plaintiff even
 4 provides exemplars of the payment screens on the YETI website to confirm that there are no
 5 policies in place that would provide consumers.”). But, at the same time, she expressly denies the
 6 existence of other clearly relevant parts of the website that contain privacy policies that speak to
 7 whether such policies exist and may otherwise bar her claims. RJN Opp. 3-4. This is the exact
 8 type of conduct that the doctrine of incorporation by reference aims to prevent. *Khoja v.*
 9 *Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (“the doctrine [of incorporation
 10 by reference] prevents plaintiffs from selecting only portions of documents that support their
 11 claims, while omitting portions of those very documents that weaken—or doom—their claims.”);
 12 *Knieval*, 393 F.3d at 1076 (taking into account web pages attached to defendant’s motion to
 13 dismiss under the incorporation by reference doctrine because plaintiffs attached to their
 14 complaint only the photograph and caption that they argued were defamatory but not the contents
 15 of the surrounding web pages).

16 Because Exhibits A-C may be properly incorporated by reference and are subject to
 17 judicial notice, the Court may consider their contents for the purposes of a motion to dismiss
 18 under Rule 12(b)(6). *Khoja*, 899 F.3d at 1003 (9th Cir. 2018); *Tellabs, Inc. v. Makor Issues &*
 19 *Rts., Ltd.*, 551 U.S. 308, 322 (2007) (on Rule 12(b)(6) motion, courts “must consider ...
 20 documents incorporated into the complaint by reference, and matters on which a court may take
 21 judicial notice); *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (A court
 22 may consider “documents whose contents are alleged in a complaint and whose authenticity no
 23 party questions, but which are not physically attached to the [plaintiff’s] pleading” and “treat such
 24 documents as part of the complaint”). Plaintiff’s contrary argument misunderstands cases that
 25 limit consideration of documents for their truth of their contents. Cases recognize that a court
 26 need not view the contents of a judicially noticed public document as containing an accurate
 27 statement of historical events. *E.g., Genasys Inc. v. Vector Acoustics, LLC*, 638 F.Supp.3d 1135,
 28 1147 (S.D. Cal. 2022) (cited in Opp. at 3) (holding that courts take judicial notice of the content

1 of the document and the fact it was made available (filed), not for the truth recited in the
 2 document). But Plaintiff makes an unwarranted leap when asserting the different—and
 3 inaccurate—proposition she asserts: “courts will rarely consider the actual terms of the
 4 documents.” Opp. at 4; *see also id.* at 1 (arguing against consideration of documents for “truth or
 5 relevance”). The cases she cites nowhere support that conclusion, and indeed the entire point of
 6 taking judicial notice and considering documents incorporated by reference is to consider “the
 7 actual terms” for their “relevance.” Like a contract, the policy, banner, and terms here (Exhibits
 8 A-C) are relevant for what they said (disclosed), not for the underlying truth. For purposes of the
 9 motion to dismiss, the point is not whether the documents prove YETI did share limited
 10 information with Adyen—which, in any event, Plaintiff herself alleges. The point is that the
 11 document conspicuously disclosed that YETI would share that information—meaning Plaintiff
 12 was on notice and, by proceeding, assented. The operative language is relevant for the fact it was
 13 said, just like in a contract. *E.g., Salinas Valley Mem’l Healthcare Sys. v. Monterey Peninsula*
 14 *Horticulture, Inc.*, 2019 WL 2569545, at *4 (N.D. Cal. June 21, 2019) (incorporating by
 15 reference Administrative Service Agreement which governed disputed conduct); *Neilson v. Union*
 16 *Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1113-14 (C.D. Cal. 2003) (taking judicial notice
 17 of contracts that provided foundation for the plaintiffs’ claims), *Schuman v. Microchip Tech.*, 372
 18 F. Supp. 3d 1054, 1057 n.2 (N.D. Cal. 2019) (incorporating by reference release agreement
 19 because it “form[ed] the basis” of claim that Plaintiffs were “acting in violation of the release
 20 agreement”).

21 Plaintiff further argues that Exhibits A-C are “irrelevant” because she alleges that no
 22 policy provided constructive notice of the limited information sharing at issue on YETI’s website.
 23 RJN Opp. at 3. But she cannot defeat incorporation by reference by pointing to allegations that
 24 the documents say something different. *Steinle v. City & Cnty. of San Francisco*, 919 F.3d 1154,
 25 1163 (9th Cir. 2019) (affirming district court’s consideration of a memorandum under the
 26 incorporation by reference doctrine even though Plaintiffs dispute “the accuracy of the contents of
 27 the memorandum” because of their ongoing and substantial reliance on the memorandum). And
 28 Exhibits A-C, again, are directly related to what Plaintiff was on notice of as a result of YETI’s

website clearly and conspicuously displaying its Privacy Policy and Terms, including in a pop-up banner on the home page, as well as a link on every single subpage in obvious bold white text against a dark blue background, at the bottom of the page where consumers routinely find these types of hyperlinks on a merchant's website. When clicked on, these links direct consumers to Exhibits A and C, which are true and correct copies of the Privacy Policy and Terms as displayed on the website at the time Plaintiff accessed it. Tucker Decl. ¶¶ 5-6. Plaintiff's argument that the disclosures are "irrelevant" thus cannot survive given all her claims depend on alleged lack of notice and consent. *See Calhoun v. Google, LLC*, 645 F. Supp. 3d 916 (N.D. Cal. 2022) (dismissing plaintiffs' Section 631 claim because "plaintiffs consented to, the collection of the at-issue data."); *Gonzales v. Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1088-89 (N.D. Cal. 2018), *on reconsideration*, No. 17-cv-02264, 2018 WL 3068248 (N.D. Cal. June 21, 2018) (dismissing plaintiffs' Section 632 claim because plaintiffs consented to the tracking of vehicle through his cellphone); *TBG Ins. Servs. Corp. v. Superior Ct.*, 96 Cal. App. 4th 443, 452 (2002) (finding plaintiff has no privacy claim under the California Constitution because plaintiff "fully and voluntarily relinquished his privacy rights in the information he stored in his home computer" after he signed and consented to company's policy.)

In short, Plaintiff cannot oppose judicial notice and incorporating by reference simply because the documents reveal the inconvenient truth that her allegations about them are inaccurate.

III. CONCLUSION

For the reasons discussed in YETI's RJN and above, the Court should take judicial notice of Exhibits A-C of the Tucker Declaration.

Dated: August 19, 2024

O'MELVENY & MYERS LLP

By: /s/ Randall W. Edwards
Randall W. Edwards

Attorneys for Defendant YETI Coolers, LLC